
CLIENT ADVISORY

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UNIT OWNER'S CLAIMS AGAINST MANAGING AGENT BASED ON WATER LEAK AT CONDOMINIUM DISMISSED

Following a water leak in a condominium building, the condominium sued unit owners of a damaged unit, who had moved out after the flood and who then stopped paying their common charges. The unit owners filed a third-party complaint against the condominium's managing agent, asserting claims that included negligence, negligent hiring, and fraud. All of the unit owners' claims against the managing agent were dismissed in Columbia Condominium v. Alevy, Index No. 590669/09 (Sup. Ct. N.Y. Co. Aug. 26, 2010).

The unit owners' claim for negligence alleged that the managing agent was negligent in failing to properly contain the flood. The court dismissed this claim based on the legal principle that an agent whose status as agent is fully disclosed, such as a managing agent, is liable to third parties only for its affirmative acts and not for nonfeasance or failures to act. Here, the only specific allegation of negligence that the unit owners asserted was that the managing agent had failed to locate and shut off the water in the leaking hot-water riser within a reasonable period of time. The court held that if this were true, it was an act of nonfeasance, not an affirmative act, so the managing agent was not liable to the unit owner.

The court also dismissed a claim of negligent hiring against the managing agent based on the hiring of a mold remediation company that allegedly did not perform mold remediation on the unit expeditiously and efficiently. A claim of negligent hiring, the court observes, requires a showing that the person being hired had a known propensity to commit wrongful acts. The unit owner conceded that the remediation company comprised "experts in the field of mold removal." Because there was no allegation that the managing agent was on notice of a tendency by the remediation company to perform negligently, the court held that there was no foundation for this claim.

The court next dismissed the unit owners' claims for fraud. The unit owners alleged that the managing agent refused to provide them with a copy of a mold report and misrepresented the habitability of the unit to the unit owners. The court held, however, that because the unit owners never moved back into the unit following the water damage caused by the leak, they could not have relied to their detriment on the managing agent's representations or have suffered any damages as a result. With respect to a claim for fraud based on alleged misrepresentations made to an insurance carrier regarding the severity of the water damage, the court held that it was the insurance carrier that would have relied on such representations, not the unit owners.

Lastly, the court dismissed a claim for "negligent infliction of emotional distress" by the management company, finding that this issue had never been raised in the condominium's initial complaint and therefore was not properly part of the unit owner's third-party complaint. Accordingly, all claims against the managing agent were dismissed. Ganfer & Shore, LLP represented the managing agent in this case.

**“ROBERTS” RULING ON J-51 BENEFITS
APPLIES RETROACTIVELY, COURT HOLDS**

Last year, New York’s highest court, the Court of Appeals, ruled that landlords who had accepted tax benefits for major rehabilitation and capital improvements under New York City’s J-51 program could not take advantage of the luxury decontrol law to increase the rents on certain apartments from rent-stabilized to market rates. **Roberts v. Tishman Speyer Properties, L.P.**, 13 N.Y.3d 270 (2009), discussed in the December 2009 issue of this *Client Advisory*. Among the questions left open in this decision was whether the ruling would apply retroactively. A lower court has now held that it will. **Roberts v. Tishman Speyer Properties, L.P.**, Index No. 100956/07 (Sup. Ct. N.Y. Co. July 30, 2010).

In reaching this conclusion, the court rejected the landlords’ contention that the Court of Appeals’ decision was unforeseeable so that applying it retroactively would be unfair or unconstitutional. Rather, the court held, the Court of Appeals had “merely interpreted” the luxury decontrol provisions of the Rent Regulation Reform Act of 1993 “in accordance with the Legislature’s intent at the time the statute was enacted.” Therefore, “the retroactive application of the Decision [was] neither ‘unexpected and indefensible by reference to the law as it existed’” nor “an ‘arbitrary change[] in the law.’” Although the landlords relied on a favorable advisory opinion that had been obtained from the New York State Department of Housing and Community Renewal in 1996, the court observed that this opinion was only advisory and the agency’s interpretation was just one alternative reading of the luxury decontrol statute. This provided further evidence that the pro-tenant decision in Roberts had at least been foreshadowed years before the decision. The court allowed the litigation, brought as a purported class action on behalf of numerous residents of Stuyvesant Town and Peter Cooper Village in Manhattan, to proceed.

NEW YORK ADOPTS NEW BEDBUG DISCLOSURE ACT

Bedbugs have become a significant problem in New York City, with numerous properties, both residential and commercial, now being affected. A new Bedbug Disclosure Law, applicable to New York City and effective August 30, 2010, requires that prior to leasing real property within the city, the owner must furnish the prospective purchaser or tenant a notice describing the property’s “bedbug infestation history” for the previous year. The form of notice is to be prescribed by the State Division of Housing and Community Renewal (DHCR). For multi-unit buildings, the notice must provide information regarding the specific premises being rented as well as the building as a whole.

The law does not specify a penalty when an owner violates the statute by failing to provide the required notice. It states only that upon complaint by a tenant that a notice of bedbug infestation history was not furnished, the DHCR shall order the owner to furnish the notice. Nonetheless, it can be anticipated that tenants whose landlords failed to disclose that an apartment had a history of bedbug infestation will bring suits seeking to rescind their leases or to recover damages. The statute applies only to an “owner” leasing real property, so it is not clear whether it applies to subleases. It is also not clear precisely how it will be applied in the case of cooperative and condominium units.

Additional proposed legislation regarding bedbugs, including a bill that would extend the obligation to disclose a property’s bedbug history to sale transactions, is pending. If such legislation is enacted, and as additional guidance becomes available on how the existing law applies to cooperatives and condominiums, we will report on developments in a future *Client Advisory*.